

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 256 of 1984

in

FIRST APPEAL No 975 of 1978

For Approval and Signature:

Hon'ble MR.JUSTICE B.C.PATEL and

MR.JUSTICE C.K.BUCH

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

-----  
SABIRHUSEN YUSUFBHAI

Versus

REVA WD/O FULCHAND HARILAL  
-----

Appearance:

MR SURESH M SHAH for Appellant

MR NANDLAL THAKKAR for Respondent No. 1, 2, 3  
-----

CORAM : MR.JUSTICE B.C.PATEL and

MR.JUSTICE C.K.BUCH

Date of decision: 24/11/98

ORAL JUDGEMENT ( PER : B.C. PATEL, J )

The appellant- original plaintiff has preferred this appeal against the findings recorded by the learned City Civil Judge, 8th Court, Ahmedabad on 29.8.1978 in Civil Suit No. 1552/74 and confirmed in First Appeal No. 975/78 by the learned Single Judge of this High Court on 12.1.1983.

From the record, it transpires that the plaintiff, by an agreement dated 8.4.1973, agreed to purchase property bearing City Survey No. 2600 for an amount of Rs. 17999/ from defendant no.1 Bai Reva, widow of Fulchand. A sum of Rs. 2000/ was paid to defendant no.1 as earnest money and as per stipulation, sale-deed was to be executed within the period of 12 months during which period, defendant no. 1 was required to get her right, title and interest in the suit property cleared. From the record, it transpires that after execution of the aforesaid document by defendant no.1, Savitaben, daughter-in-law of defendant no.1 for herself and as a guardian of her minor son Chandrakant together with Babubhai, son of defendant no.1, filed a suit against defendant no.1 and Rasiklal- another son of defendant no.1, for an injunction restraining them from alienating the property in question in any manner whatsoever. Interim injunction was granted as a result of which defendant no.1 was not in a position to carry out her obligation. The plaintiff by notice dated 6.4.1974, called upon defendant no.1 to execute sale-deed in his favour and the same having not been complied with, the present suit came to be filed. It is also required to be noted at this stage that on 21.6.1974, the suit filed by Savitaben referred to earlier, was unconditionally withdrawn and on that very day, defendant no.1 executed document transferring the right in the property to defendant nos. 2 & 3. The plaintiff filed a suit for permanent injunction restraining defendant no.1 from transferring, assigning or selling the suit house which

came to be withdrawn with a liberty to file a fresh suit on the same cause of action on 2.7.1974 and the suit bearing Civil Suit No.1552/74 was filed on 9.7.1974 which is the subject matter of the appeal. Learned Single Judge pointed out that from the evidence, it transpires that defendant no.1 had only undivided share in the house. No partition had ever taken place. This is the only ancestral property now left in the hands of the members of the family, a part of which is occupied by Babubhai, one of the sons of Fulchand, a part of which is occupied by Savitaben, widow of another son of Fulchand.

None of these persons are joined as party to the suit even though relief for possession of the entire property has been prayed for.

Learned Single Judge pointed out in the judgment that plaintiff had knowledge about the fact that other persons had also share in the suit house. The suit was not filed for the purpose of compelling defendant no.1 to convey her right, title and interest in the suit house, but it was for compelling defendant no.1 to convey full title over the suit house and to recover possession of the entire suit house by virtue of that title. Learned Single Judge has pointed out that there is sufficient evidence to conclude that the property was the joint family property. The conclusion is drawn on the basis of certain documents. The plaintiff knew that the property was occupied by Nandlal and Babulal. On re-appreciating the evidence, learned Single Judge held that it becomes apparent that the plaintiff knew that Babulal was

occupying the suit house on his own right as a heir of deceased Fulchand and yet, he agreed to purchase the property only from defendant no.1. Considering the fact that it was a simple suit for specific performance of an agreement and no relief for possession was claimed against the subsequent purchaser, no relief for possession was claimed, are the facts to be born in mind.

Learned Single Judge considered these facts in light of the evidence led by the parties and while considering evidence placed on record, held that in the instant case, learned Trial Judge has rightly exercised the discretion and was fully justified in dismissing the suit of the plaintiff for specific performance.

Mr. Shah, learned counsel appearing for the appellant submitted that in view of the agreement to sell, vendor's right should not be affected and the Court should always protect the same. He submitted that when a suit for specific performance of the contract is filed and it is brought to the notice of the Court that there is subsequent agreement, then in such a case, the Court should direct the persons claiming right in the property to join in conveyance so as to pass on the title claimed by the purchaser of the property and he should be protected. He relies for this purpose on the decision of the Apex Court in the case of Durgaprasad v/s Deepchand, reported in AIR 1954 SC 75. There was a sale of some property in favour of two different parties. Then how the right of prior transferee is required to be protected

is pointed out. After considering two different views prevailing, the Apex Court pointed out that " .... In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff." It is submitted that in view of this, defendant nos. 2 & 3 should be called upon to confirm the sale in favour of the plaintiff.

From the judgment, it is clear that this is not the case wherein only defendant nos. 2 & 3 were the parties whose interest was required to be considered. Even though the plaintiff knew that it was an ancestral house; other members of the family had share in it and some of them were staying therein, he did not get the agreement executed by all. It was within the knowledge of the plaintiff that defendant no.1 was not in possession and others were occupying the property. An attempt is made by the plaintiff to deprive other co-parceners of their right, title and interest in the suit property. In our opinion, if a decree for specific performance is passed, it is bound to lead to multiplicity of proceedings. The Court is bound to consider equitable considerations while passing the order. In our opinion, the same has been considered while refusing the decree for specific performance. If

the plaintiff was not aware about the right, title and interest of others, the matter would stand on different footing. It is equally true that the plaintiff may not join all as party for obtaining a decree for specific performance. We are of the view that in a matter like this, if the decree is passed, it would certainly lead to further litigation and multiplicity of proceedings.

Mr. Shah, learned counsel for the appellant submitted that the decree as prayed for should not be refused merely on the ground that there are others who have right, title or interest in the property. He submitted that as held by the Apex Court in the case of Prakashchandra v/s Angadlal, reported in AIR 1979 SC 1241, the ordinary rule is that specific performance should be granted. The Court has also pointed out that it ought to be denied only when equitable considerations

point to its refusal and the circumstances show that the damages would constitute an adequate relief. In the instant case, the appellant filed a suit earlier without a prayer for a decree for specific performance. He withdrew the same with a leave of the Court to file a suit subsequently claiming relief for specific performance. It can be said from the evidence as discussed by the trial Court and re-appreciated by the learned Single Judge that the plaintiff was aware about the fact that the suit house was an ancestral property and others were occupying the same. Yet, they were not joined as party. A person occupying the property would certainly indicate that the performance of the contract

would cause hardship to them. It is also pointed out by the learned Single Judge that passing a decree for specific performance would lead to further litigation and multiplicity of proceedings and is also required to be born in mind at this stage. The Trial Court in para-27 of the judgment, has considered these aspects and has pointed out that defendant no.1 being not the absolute and sole owner of the suit house and having no right to agree to sell the suit house to the plaintiff, if the specific performance is granted, that would lead to multiplicity of proceedings, if not against others, atleast against Babulal.

Mr. Shah, learned counsel appearing for the appellant has submitted that in view of the decision of the Apex court in the case of Kartarsing v/s Harjinder, reported in AIR 1990 SC 854, specific performance in respect of the share of the property cannot be refused on the ground that the property will have to be partitioned, when he has right to apply for partition and get share determined. That was a case of property owned by two persons jointly. The properties agreed to be sold were clearly distinguishable by shares of the respective vendors. The Court pointed out that in the circumstance that absentee vendor for some reason or the other refused to accept the agreement, there is no reason why agreement should not be enforced against the vendor who had signed it and whose property is identifiable by his specific share. Brother and sister were the joint owners and it was not contended that the brother and sister did not own

the property in equal share and the vendor entered into an agreement both on behalf of himself as well as on behalf of his sister and thus, it was clear to the vendee that the property belonged to the brother and sister. In

the instant case, though known to the plaintiff that the property is an ancestral property, persons entitled to share are occupying the property and partition had never taken place, yet he entered into an agreement with defendant no.1 and filed the suit without joining others who were entitled to have a share in the property. Hence, aforesaid decision is of no help to the appellant.

Mr. Shah, learned counsel has submitted that atleast adequate amount of damages should have been awarded to the plaintiff looking to the value of the property. As against this, it is pointed out to us that the property was worth Rs.18,000/ & Odd and against Rs. 2000/, paid by way of earnest money, the Court has awarded Rs. 1500/ by way of damages. It is required to be noted that the amount of Rs. 2000/ is to be repaid with interest as directed by the trial Court and so also the amount of damages as awarded by the Trial Court. Mr. Shah has further contended that considering the value of the property in the city, if adequate compensation is awarded to the plaintiff, justice will be done to the parties. Considering this submission, we are of the view that instead of Rs. 1500/, a sum of Rs. 3500/ ( Rs. three thousand five hundred only ) be awarded by way of damages on the same terms and conditions.

In the result, appeal is partly allowed by maintaining the order passed by the Trial Court in so far as the decision with regard to the declaration is concerned and with regard to the recovery of the amount from the plaintiff is concerned. So far as damages are concerned, we modify the orders substituting Rs.3500/ (Rs. three thousand five hundred only ) instead of Rs.1500/ as awarded by the trial court and confirmed by the learned Single Judge. There shall be no order as to costs.

Appeal is allowed to the aforesaid extent only.

00000

\*rawal